78-1939

In The

Supreme Court of the United States

October Term, 1979

No. A-1053

JOSEPH S. COLOGNINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN W. CONDON, JR., ESQ.
Attorney for Petitioner
300 Statler Office Building
Buffalo, New York 14202
(716) 856-2183

Condon, Sedita & LaTona, P. C.
Of Counsel

July 1, 1979

Daily Record Corporation
Rochester, New York

(4956)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Chronology	*ii*
Preliminary Statement	*iii*
Table of Authorities	*iv*
Opinion Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statutes and Rules Involved	2
Questions Presented	4
Statement of Facts	5

REASONS FOR GRANTING THE WRIT

I. Does the regularly employed prosecutorial device of "subject to connection" pass constitutional muster when used to admit statements of a co-conspirator in violation of the hearsay rule?	9
II. In a multi-defendant case, may the Government create its own strategic advantage by the belated dismissal as to a co-defendant once trial proceedings have commenced?	15
Conclusion	19

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit	A-1
Appendix B — Statutes Involved	B-1

CHRONOLOGY

3/23/78	Arrest.
3/31/78	Indictment.
9/ 5/78	Plea of guilty by co-defendant, Hiawatha Jackson.
10/10/78	Jury selection by Petitioner and co-defendant, Melvin Brown.
	First interview of co-defendant Jackson by Government.
11/ 2/78	Second interview of co-defendant Jackson.
11/ 5/78	Third interview of co-defendant Jackson.
11/ 6/78	Dismissal as to co-defendant Brown on Government's motion.
	Commencement of Petitioner's trial.
11/16/78	Jury verdict of guilty as to Petitioner.
1/11/79	Petitioner sentenced.
5/17/79	Second Circuit Court of Appeals affirmance of conviction.

PRELIMINARY STATEMENT

Petitioner is a 35-year-old assembly line automation tender who presently resides in the Buffalo, New York suburb of Cheektowaga with his wife and two young daughters. Although originally indicted with two co-defendants on federal drug distribution charges in late March, 1978, he eventually stood trial alone the following November.

One co-defendant, HIAWATHA JACKSON, entered a plea of guilty in early September, 1978, and became a key prosecution witness at Mr. Colognino's trial. Melvin Brown, the second co-indictee, was dismissed from the action on the Government's initiative only moments before the swearing of the jury. Approximately two months after his conviction, Petitioner was sentenced to concurrent five year prison terms and a special two year parole term by the HONORABLE JOHN T. CURTIN of the Western District of New York.

By this petition, Mr. Colognino seeks to challenge the Government's continued reliance upon the doctrine of conditional admissibility as a means of prematurely introducing facially hearsay testimony in conspiracy-type prosecutions. Petitioner also endeavors to bring before the Court the impropriety of the untimely dismissal with respect to MELVIN BROWN on the very afternoon when trial was scheduled to commence.

TABLE OF AUTHORITIES

	Page
Berger v. United States, 295 U. S. 78 (1934)	16
Blumenthal v. United States, 332 U. S. 539 (1947)	12
Bordenkircher v. Hayes, 434 U. S. 357 (1978)	16
Bruton v. United States, 391 U. S. 123 (1968)	12
Carroll v. State, 139 Fla. 233, 190 So. 437 (1939)	17
Glasser v. United States, 315 U. S. 60 (1942)	11, 14
Holland v. United States, 348 U.S. 121 (1954)	16
Jackson v. Denno, 378 U. S. 368 (1964)	12
Krulewitch v. United States, 336 U.S. 440 (1949)	9, 11, 12
Mapp v. Ohio, 367 U. S. 643 (1961)	19
Nader v. Saxbe, 497 F. 2d 676 (D. C. Cir. 1974)	16
Rochin v. California, 342 U. S. 165 (1952)	19
Rogers v. United States, 304 F. 2d 520 (5th Cir. 1962)	17
Serfass v. United States, 410 U. S. 377 (1975)	16
State v. Thompson, 68 Ariz. 386, 206 P. 2d 1037 (1949)	18
Swain v. Alabama, 380 U. S. 202 (1965)	18
United States v Dennis, 183 F. 2d 201 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951)	12
United States v. Geaney, 417 F. 2d 1116 (2d Cir. 1969) *cert. denied sub nom., Lynch v. United States*, 397 U. S. 1028 (1970)	10, 12, 13
United States v. James, 576 F. 2d 1121 (1978), *modified*, 590 F. 2d 575 (5th Cir. 1979)	19
United States v. Lusterino, 450 F. 2d 576 (2d Cir. 1971)	19

	Page
United States v. Macklin, 573 F. 2d 1046 (8th Cir.), *cert. denied*, ___ U. S. ___, 99 S. Ct. 160 (1978)	10, 11
United States v. Mutchler, 559 F. 2d 955 (1977), *modified*, 566 F. 2d 1044 (5th Cir. 1978)	18
United States v. Nixon, 418 U. S. 683 (1974)	10
United States v. Petroziello, 548 F. 2d 20 (1st Cir. 1977)	10, 11
United States v. Rispo, 460 F. 2d 965 (3d Cir. 1972)	18
United States v. Sams, 470 F. 2d 751 (5th Cir. 1972)	18
United States v. Turner, 558 F. 2d 353 (9th Cir. 1977)	18
William v. Florida, 399 U. S. 78 (1970)	16

United States Constitution

Fifth Amendment	2, 12

Statutes and Rules

ABA Code of Professional Responsibility, Canon 7, EC 7-13	4, 16
ABA Standards for Criminal Justice *The Prosecution Function*, §3.11 (1971)	4, 16
Crimes and Criminal Procedure 18 U.S.C. §2 (1951)	2, 4
Drug Abuse Prevention and Control 21 U.S.C. §841 (1970)	1, 4
21 U.S.C. §846 (1970)	1, 4
Federal Rules of Criminal Procedure [Title 18, U.S.C.] Rule 29	3, 13

Page

Federal Rules of Evidence [Title 28, U.S.C.]

Rule 104 ..... 2, 10, 11, 14

Rule 611 ..... 3, 14

Rule 801 ..... 3, 9, 10, 13

Rule 802 ..... 3, 9

Articles and Treatises

Maguire and Epstein, *Preliminary Questions of Fact in Determining The Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927) 14

1 J. Weinstein and M. Berger, *Weinstein's Evidence*, Rules 101-403 (Matthew Bender 1978) 11

In The

Supreme Court of the United States

October Term, 1979

No. A-1053

JOSEPH S. COLOGNINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, JOSEPH S. COLOGNINO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 17, 1979.

OPINION BELOW

The opinion of the Court of Appeals, dated May 17, 1979, is reprinted in Appendix A, *infra*, at p. A-1 *et seq.*

JURISDICTION

Following a jury trial in the United States District Court for the Western District of New York, Petitioner was found guilty on November 16, 1978, of three counts of accessorial conduct and one count of conspiracy as to the distribution of a controlled substance, phencyclidine hydrochloride. 21 U. S. C. §841(a) (1),

§846; 18 U. S. C. §2. On January 11, 1979, the HONORABLE JOHN T. CURTIN imposed a sentence consisting of concurrent five year prison terms and a special two year parole term on each count.

Petitioner perfected an appeal to the United States Court of Appeals for the Second Circuit. On May 17, 1979, his conviction was affirmed by a three-judge panel.

This petition for a Writ of Certiorari is filed within 45 days of that ruling; an extension of time having been granted by Mr. Justice Thurgood Marshall in an order dated June 5th, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, which provides in pertinent part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law ...."

STATUTES AND RULES INVOLVED

Fed. Rules Evid. [28 U. S. C.], which provide in pertinent part:

Rule 104. Preliminary Questions

> "(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> "(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

> "(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests."

Rule 611. Mode and Order of Interrogation and Presentation.

> "(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Rule 801. Definitions [Hearsay]

> "(d) Statements which are not hearsay. A statement is not hearsay if ....
>
> "(2) Admission by party opponent. The statement is offered against a party and is ... (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

Rule 802. Hearsay Rule

> "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Fed. Rules Cr. Proc. [18 U.S.C.], which provide in pertinent part:

Rule 29. Motion for Judgment of Acquittal

> "(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on

> motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . . "

ABA Code of Professional Responsibility, Canon 7, which provides in pertinent part:

> "EC 7-13. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. . . . Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."

ABA Standards for Criminal Justice, *The Prosecution Function*, which provide in pertinent part:

3.11 Disclosure of evidence by the prosecutor.

> "(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused."

Title 21, United States Code, Sections 841 and 846, as well as Title 18, United States Code, Section 2, because of their limited applicability to this petition, are reprinted in pertinent part in Appendix B, *infra*, at B-1 *et seq.*

QUESTIONS PRESENTED

1. Does the regularly employed prosecutorial device of "subject to connection" pass constitutional muster when used to admit statements of a co-conspirator in violation of the hearsay rule?

2. In a multi-defendant case, may the Government create its own strategic advantage by the belated dismissal as to a co-defendant once trial proceedings have commenced?

STATEMENT OF FACTS

On March 23, 1978, in the Buffalo, New York suburb of Cheektowaga, agents of the Drug Enforcement Administration arrested Petitioner, HIAWATHA JACKSON and MELVIN BROWN (9).* The affidavit sworn to on the following day by Agent-in-Charge, JOHN M. IWINSKI, averred that Mr. Jackson had sold varying quantities of phencyclidine hydrochloride to him on four different occasions during the first three months of 1978 (8-9). Contrasted with the absence of any direct evidence against Petitioner, other than his presence in the vicinity of these drug transfers, the Iwinski affidavit contained directly incriminatory information as to Mr. Brown (8-9).

On the date of the final transaction, Mr. Jackson reportedly declared in Mr. Brown's presence that Agent Iwinski should surrender the money for the drugs to Brown (9). As the parties later departed to consummate the delivery, Agent Iwinski recalled Mr. Jackson proclaiming that Melvin Brown ". . . would follow to make sure that nothing went wrong" (65). Questioned on cross-examination as to whether Mr. Brown was innocent, Agent Iwinski forthrightly responded: "I don't believe so" (Tr. 225-226).**

Despite the postponement of jury selection on September 5, 1978, Hiawatha Jackson appeared before the HONORABLE JOHN T. CURTIN and entered a plea of guilty to the third count of the indictment (98). However, his first meeting with Agent Iwinski, apparently in anticipation of his appearance as a witness at trial, did not occur until exactly five weeks later on October 10, 1978 (55). At precisely the same time, Petitioner and Mr. Brown were jointly enaged in jury selection in anticipation

---

*( ) refers to pages of Appendix filed in the United States Court of Appeals for the Second Circuit.

**(Tr.) refers to pages of trial transcript not incorporated into Appendix.

of their imminent trial (4). The communal character of this proceeding is reflected in their sharing of peremptory challenges; each round being prefaced by meetings among the two remaining defendants and their attorneys in the outer corridor of the courtroom (24-37).

The Government's initial interview of Mr. Jackson was later supplemented by two additional pretrial conferences on the 2d and 5th days of November, 1978 (55-57). Melvin Brown's complicity in the events underlying the indictment was not even raised until the last-mentioned date in a span of "[m]aybe a few minutes" (94-95). When Jackson responded that he could not recall ever instructing Agent Iwinski to give the money to Brown, the matter was not pursued any further (93-95). As well, a written statement which was signed by Mr. Jackson in the context of the October 10th meeting with Agent Iwinski inexplicably referred to Melvin Brown on but three occasions as "a friend" (58, 113-114).

Armed by hindsight with knowledge of the above, the United States Attorney's motion to dismiss as to Mr. Brown on the afternoon of November 6, 1978, literally moments before the swearing in of the jury, lacks any element of surprise (39-41). However, from Petitioner's unenlightened perspective, including Mr. Brown's uncommunicated awareness during jury selection one month earlier that Mr. Jackson intended to exonerate him (88), this dramatic event could not have been more unexpected.

Relying upon this untimely dismissal, Petitioner unsuccessfully argued on the following afternoon that his mutual exercise of peremptories with Mr. Brown provided a basis for a mistrial (80-84). In opposing this request, the United States Attorney memorialized the quandary which required Brown's removal from the proceedings:

> "It is not the case that the case against Brown was deemed to be worthy of dismissal following his [Jackson's] statement and it was only after I talked to Mr. Jackson myself last Thursday night for several hours that we decided that perhaps *based on his version* at that time and the explanation we had available to us then which was really the first time we had it, that the case against Mr. Brown would be better served by being dismissed and then I confirmed that again when I talked to Mr. Jackson Sunday." (82; emphasis supplied).

The first witness called by the Government was Agent Iwinski. At an early stage of his direct examination, he was queried as to a conversation he had engaged in with HIAWATHA JACKSON during the indictment period (42). Due to the presence of a conspiracy charge in the indictment (10-12) and counsel's awareness that Jackson had conversed with Agent Iwinski within this time frame (8-9), a meeting with the Court had been arranged prior to trial in an effort to establish the procedure which would be followed in applying the rule which permits admission of statements of a co-conspirator against a non-declarant party. A letter was then submitted to the Court reflecting counsel's best understanding that such facially hearsay testimony would only be deemed admissible *after* sufficient independent evidence had been presented to establish the existence of a conspiracy (38).

Despite counsel's objection that the Government clearly had not satisfied its requisite burden at the time of Agent Iwinski's appearance as a witness, the Court nevertheless permitted the prosecutor to proceed upon his representation that the hearsay response would later be connected to a conspiracy (42-49). The jury then returned to the courtroom and received an instruction that they would ultimately decide whether or not a conspiracy had been adequately proven antecedent to their consideration of the conditionally admitted hearsay testimony (50-51).

Aware that the Court's pretrial representation in this connection had been misunderstood, counsel attempted to clarify the basis for the hearsay objection the following morning. Referring to the earlier correspondence submitted on

Petitioner's behalf, Judge Curtin responded with certitude that he knew the nature of the objection (52-53).

At the close of testimony on November 14, 1978, the Court was requested to direct a verdict of acquittal or, alternatively, rule that the Government had failed to lay an appropriate foundation for admission of any facially hearsay testimony (Tr. 884-887). Judge Curtin's sole response in denying this motion encompassed a characterization of witness credibility as a jury question (Tr. 888-889).

Following the return of a guilty verdict on November 16, 1978, sentence was imposed on January 11, 1979. Petitioner's conviction was affirmed by the Court of Appeals for the Second Circuit in an opinion issued on May 17, 1979 (App. A, *infra*). An implicit finding by the trial court as to the existence of a conspiracy was found in Judge John T. Curtin's denial of the motion for a directed verdict of acquittal. Conditional admission of the hearsay testimony of Agent Iwinski was deemed proper. Viewing the last minute dismissal of Melvin Brown as unavoidable, the Second Circuit further ruled that Petitioner was not thereby prejudiced.

REASONS FOR GRANTING THE WRIT

I.

Does the regularly employed prosecutorial device of "subject to connection" pass constitutional muster when used to admit statements of a co-conspirator in violation of the hearsay rule?

Concurring in *Krulewitch v. United States*, 366 U.S. 440 (1949), Justice Jackson recognized the perplexing problems inherent in the rule which permits otherwise hearsay declarations to be introduced in conspiracy-type prosecutions:

> "When the trial starts, the accused feels the full impact of conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf., Blumenthal v. United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 167 F. 2d 54." 336 U.S. at 453.

Starting with the proposition that hearsay is inadmissible, the Federal Rules of Evidence proceed to outline those extrajudicial statements which are not to be so characterized. Rules 802; 801. Included in the latter category are statements of a co-conspirator, provided the following elements are sufficiently established:

1. A conspiracy existed;
2. the defendant and the declarant were members;
3. the contested statements were uttered during the course; and
4. in furtherance of that concerted activity. Rule 801 (d) (2) (E).

Preliminary questions antecedent to the introduction of proferred evidence are governed by Rule 104. Whereas issues of competence are to be decided by the court pursuant to subdivision (a), matters of relevance are assigned to the jury in accordance with subdivision (b). A majority of the federal circuits now agree that the admissibility of statements of a co-conspirator properly falls within the court's domain under Rule 104(a). *See, e.g., United States v. Macklin,* 573 F. 2d 1046 (8th Cir.), *cert. denied,* ____U.S.____, 99 S. Ct. 160 (1978); *United States v. Petroziello,* 548 F. 2d 20 (1st Cir., 1977); *accord, United States v. Nixon,* 418 U.S. 683, 701 n.14 (1974); *United States v. Geaney,* 417 F. 2d 1116 (2d Cir. 1969), *cert. denied sub nom., Lynch v. United States,* 397 U.S. 1028 (1970).

Consistent with the judiciary's acceptance of its role in this context, the seldom questioned and much abused practice of permitting co-conspiratorial hearsay to be conditionally admitted subject to eventual connection must be evaluated. Usurpation of the function formerly served by the jury when this issue was injected into a trial has the effect of nullifying the primary justification for reliance upon the subject to connection approach as to questions of competence.

Continued recognition of the propriety of employing rules of conditional admissibility as to matters of relevancy (Rule 104(b)) flows from the substantially reduced risk of prejudice if irrelevant evidence is improperly presented to the jury:

> "The rationale behind giving such questions to the jury is that since no protective evidentiary policy is at stake the jury is just as capable as the judge in making a determination. The only real discriminations which must be made in this process involve evaluations of probative force which are within the usual domain of the jury. Consequently, following the judge's instructions to disregard the primary evidence if they find against the preliminary fact does not require the intellectual control required when trying to ignore matters which should be excluded under challenges to competence of the evidence." Weinstein and Berger, *1 Weinstein's Evidence,* Rules 101-403, at 104-54 (Matthew Bender 1978).

In conjunction with its adoption of Rule 104(a) as the appropriate guideline in handling questions pertaining to the admissibility of statements of a co-conspirator, the Fifth Circuit announced that the subject to connection procedure should be abandoned whenever practicable. *United States v. James,* 576 F. 2d 1121 (1978), *modified,* 590 F. 2d 575 (5th Cir. 1979). *Cf. United States v. Macklin, supra,* 573 F. 2d 1046, 1049, n.3; *United States v. Petroziello, supra,* 548 F. 2d 20, 23, n.3. The Fifth Circuit voiced concern with the following dangers which attach to conditionally admitting outwardly hearsay utterances:

1. Unconsciously bootstrapping the hearsay to the independent evidence to satisfy the four-fold elements referred to above.

2. Failing to undo the taint inflicted on the jurors' minds by the hearsay in the event the trial judge determines that the Government has not satisfied its antecedent burden.

3. Declaring a mistrial if a limiting instruction to disregard the hearsay has the appearance of futility.

The need to find the defendant's connection to the conspiracy from the independent evidence was pronounced by this Court in *Glasser v. United States,* 315 U.S. 60, 74-75 (1942). Since that ruling, courts have wrestled with the practical difficulty which confronts even the most able judicial mind attempting to comply with the bootstrapping prohibition. *E.g. Krulewitch v. United*

States, supra; United States v. Geaney, supra, 417 F. 2d 1116, 1120; *United States v. Dennis,* 183 F. 2d 201, 231 (2d Cir. 1950), *aff'd.* 341 U.S. 494 (1951).

Particularly to the degree that the preliminary and ultimate questions overlap (*i.e.*, the defendant's role as a conspirator), the risk of a due process violation is awesome. U.S. Constitution, Amendment V. An analogous danger faced this Court in considering the former New York procedure for determining the voluntariness of confessions. Stressing the overriding need for a reliable and decipherable determination of voluntariness separate and apart from the issue of truthfulness, a factfinding hearing in the jury's absence was recognized as the sole viable safeguard. *Jackson v. Denno,* 378 U.S. 368 (1964). The Court aptly framed the problem in the following terms:

> "The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession." 378 U.S. at 381.

In instances where the court finds that the prosecutor has not connected the hearsay declarations to a conspiracy, the impotency of a cautionary instruction to the jury is well documented. *E.g. Krulewitch v. United States, supra.* Such an instruction may tend to underscore rather than annihilate the importance of the inadmissible hearsay in the mind of the lay juror. In multiple defendant proceedings, this Court has seriously questioned the viability of a limiting instruction to consider highly prejudicial evidence against less than all of the parties. *Bruton v. United States,* 391 U.S. 123, 128-129 (1968); *Blumenthal v. United States,* 332 U.S. 539, 559 (1947).

The Second Circuit's rationale in affirming Petitioner's conviction discloses an additional risk in the conditional admission of outwardly hearsay testimony. Unable to locate a precise finding by the trial court that the Petitioner had been connected to a conspiracy, it was held that this ruling was implicit in Judge Curtin's denial of counsel's motion for a directed verdict of acquittal.

However, this holding neglects to consider the differing procedural rules applicable to determination of an acquittal motion. In accordance with Rule 29 (a) of the Federal Rules of Criminal Procedure, the court must examine the evidence in a light most favorable to the Government. The trial judge is required to decide whether the evidence presented, if believed, would be sufficient to sustain a conviction. As well, the burden of persuasion is placed squarely on the accused, rather than the prosecutor.

In marked contrast, Second Circuit procedure mandates application of a preponderance of the evidence standard to the question of whether or not proffered hearsay has been sufficiently connected to a conspiracy. *United States v. Geaney, supra.* To the degree that this criteria contemplates a weighing of the evidence, including an assessment of witness credibility, it would be at variance with the standard applied to a motion for acquittal. Significantly, Judge Curtin's sole response in denying counsel's motion at the close of the Government's case was framed in terms of witness credibility being a jury question (Tr. 888-889). As to the burden of persuasion on an issue of evidentiary admissibility, it is also beyond cavil that the onus rests with the proponent; in this case the Government, not the accused.

From another perspective, Fed. Rules Evid. 801(d) (2) (E) clearly contemplates a finding not only as to a defendant's membership in a conspiracy, but also that the proferred hearsay was uttered during the course and in furtherance of the con-

certed enterprise. That similar factors are not necessarily encompassed in the evaluation of a motion for a directed verdict of acquittal cannot be gainsaid.

The Second Circuit's ruling also neglects to consider the bootstrapping prohibition as to a defendant's connection with a conspiracy. *Glasser v. United States, supra.* In a word, appellate review is rendered meaningless; it being "next to impossible to unscramble the egg." Maguire and Epstein, *Preliminary Questions of Fact In Determining the Admissibility of Evidence,* 40 Harv. L. Rev. 392, 394-395 (1927).

The solution is clearly workable and consistent with the Federal Rules of Evidence. Subdivision (c) of Rule 104 makes specific provision for a hearing in the jury's absence as a mechanism for resolving preliminary questions of competency. Equally, the trial court is empowered under Rule 611(a) to control the order of proof.

The recent recognition by a majority of the federal circuits of the trial judge's responsibility to resolve the preliminary issue as to admission of statements of a co-conspirator provides an appropriate opportunity for announcement of a procedural rule more protective of a defendant's right to a fair trial. The risks of prejudice which are interwoven in the subject to connection approach are in no fashion counterbalanced by the minimal inconvenience attendant to the procedure advocated herein.

II

In a multi-defendant case, may the Government create its own strategic advantage by the belated dismissal as to a co-defendant once trial proceedings have commenced?

The extended factual recitation at the outset of this petition is designed to document the basis for counsel's assertion that the Government consciously refrained from exploring the degree of Melvin Brown's complicity in the events giving rise to Petitioner's conviction. The motivation for this omission is reflected in the United States Attorney's statement that Hiawatha Jackson's *version* of those events necessitated a dismissal as to Mr. Brown. In other words, had Brown remained as a co-defendant and been exonerated by his longtime friend, the Government would have effectively impeached its own key witness. This conduct becomes particularly troublesome in light of the supervising agent's (Iwinski's) concession that he did not believe Mr. Brown was innocent.

The Government's allegations as to Mr. Jackson related solely to his sale of drugs to Agent Iwinski. As a consequence, the dismissal with respect to Brown served the ancillary purpose of avoiding any implication that he was indeed Jackson's source of supply. Conversely, Brown's initial insertion as a co-defendant followed by his later removal *after* jury selection served to reinforce the inference that Mr. Brown had not performed this function. The trial therefore became, prior to the appearance of the first witness, a self-fulfilling prophecy that, circumstantially, Petitioner had to be the culprit.

Although available for the preceding five weeks, Mr. Jackson was never interviewed by any Government representative until the very day that Petitioner and Mr. Brown selected a jury. Brown was not even discussed on that date and was referred to in Jackson's written statement simply as "a friend." During two ensuing conferences with Jackson, Brown's involvement was

covered over a period of minutes. Hiawatha Jackson's blanket denial of those matters which bore heavily against Brown's innocence was taken at face value. *Cf.* ABA Standards for Criminal Justice, *The Prosecution Function*, §3.11(c) [1971].

In moving to dismiss as to Melvin Brown, the United States Attorney waited until the last available opportunity before jeopardy would conceivably have attached: immediately prior to the swearing in of the trial jury. *Serfass v. United States*, 420 U.S. 377 (1975). To allow this strategic ploy to remain intact without judicial intervention would violate Justice White's characterization of the adversary system as:

> "... hardly an end in itself; it is not yet a poker game in which player's enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82 (1970; footnote omitted).

Although the prosecutor is provided with substantial latitude as to the charging decision, this Court has recognized that his discretion is not beyond reproach.

> "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 669 (1978; footnote omitted.)
>
> *Accord, Nader v. Saxbe*, 497 F. 2d 676, 679-680 n.19 (D.C. Cir. 1974).

Persistent citation having served to undercut its intended meaning, the concept is nevertheless viable that a prosecutor's duty is to see that justice is done rather than convictions secured. *Holland v. United States*, 348 U.S. 121, 135-136 (1954); *Berger v. United States*, 295 U.S. 78, 88 (1934); ABA Code of Professional Responsibility, Canon 7, EC 7-13. Significantly, the *Holland* Court perceived this obligation, in the analogous

context of tax evasion prosecutions, as contemplating the good faith pursuit of any leads which could reasonably tend to negate the target taxpayer's guilt.

The consequent harm suffered by Petitioner herein requires an examination of the selection of the jury four weeks in advance of the actual presentation of evidence. The record is replete with instances which depict the communal nature of this proceeding as between Petitioner and Mr. Brown. Each round of peremptory challenges was preceded by a meeting of the parties and their attorneys outside the courtroom. All challenges thereafter exercised were appropriately announced as flowing from a mutual consensus among the participants.

Unbeknownst to Petitioner, this appearance of cooperation was not absolute. Through his later appearance as a Government witness, Mr. Brown confessed that he had been cognizant of Mr. Jackson's intention to exonerate him for a number of months. In effect, this revelation meant that Brown and his attorney had approached *voir dire* with an interest coincident to that of the Government: selection of a panel which would be inclined to view Hiawatha Jackson as a credible witness. From a varied perspective, Petitioner also suffered to the degree that his evaluation of the venire was framed against a factual backdrop which would no longer be viable at the time the jury was to be sworn.

Although recognized to be of limited precedential value, the Supreme Court of Florida found cause for reversal where, in the midst of jury selection, a severance had been granted to a co-defendant with whom the appellant had been required to share peremptory challenges. *Carroll v. State*, 139 Fla. 233, 190 S. 437 (1939). Equally, the Fifth Circuit has condemned, as unduly prejudicial, the practice of permitting a co-defendant to enter a plea of guilty after selection of the jury. *Rogers v. United States*, 304 F. 2d 520 (5th Cir. 1962).

From another vantage point, any impairment of so valued a right as the peremptory challenge embodies reversible error even absent a showing of prejudice. *Swain v. Alabama*, 380 U.S. 202, 219 (1965). Whether or not the jury, as empanelled, constituted a fair and impartial factfinder is not the determinative factor. *E.g. State v. Thompson*. 68 Ariz. 386, 206 P. 2d 1037 (1949). In this connection, Petitioner respectfully takes issue with that portion of the Second Circuit's affirmance which is couched in terms of an absence of any showing of prejudice. App. A., *infra*.

"Impairment" of the peremptory challenge has been found in instances where a jury is chosen in reliance upon information rendered obsolete prior to the actual presentation of evidence; as where members of the panel are permitted to sit on other similar prosecutions during the interim. *United States v. Mutchler*, 559 F. 2d 955 (1977), *modified*, 566 F. 2d 1044 (5th Cir. 1978). The overwhelming importance of defense counsel's perception of the scenario in which peremptories are exercised is reflected in *United States v. Turner*, 558 F. 2d 535 (9th Cir. 1977), and *United States v. Sams*, 470 F. 2d 751 (5th Cir. 1972). Reversal in each case flowed from confusion surrounding the trial court's procedure for finding a waiver of unexpended peremptories.

From the standpoint of the prosecutor's role in permitting jury selection to occur against a misapprehended factual backdrop, Melvin Brown's participation in *voir dire* differs little in ultimate effect from instances where a "sham" defendant has been deceptively inserted into the trial framework. Rejecting application of the harmless error yardstick in this context, the Third Circuit has observed that: "... the effect of some errors which affect the entire trial process cannot be intelligently gauged by applying such a test." *United States v. Rispo*, 460 F. 2d 965, 974 (3d Cir. 1972). In similar fashion, the Second Circuit has warned that:

> "When the prosecution participates in allowing a false picture to be painted, it bears a heavy burden of showing that it could not have affected the verdict." *United States v. Lusterino*, 450 F. 2d 572, 575 (2d Cir 1971).

This Court's analysis of other due process violations evidences a concern for the fairness of the procedure rather than the correctness of the outcome. For example, in *Mapp v. Ohio*, 367 U.S. 643 (1961), an element of due process was found in the formulation of an exclusionary rule prohibiting illegal searches and seizures. Employment of forcible stomach-pumping in an effort to retrieve swallowed morphine capusules has also been held to implicate due process considerations without regard to whether or not an illegal substance was ultimately recovered. *Rochin v. California*, 342 U.S. 165 (1952).

Review is therefore sought by the entire Court as to the scope of the prosecutor's duty in the context of a trial defendant's right to the unfettered exercise of peremptory challenges at jury selection.

CONCLUSION

For all these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

JOHN W. CONDON, JR., ESQ.
Attorney for Petitioner
300 Statler Office Building
Buffalo, New York 14202
(716) 856-2183

Condon, Sedita & LaTona, P. C.
Of Counsel

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of May one thousand nine hundred and seventy-nine.

PRESENT: HONORABLE IRVING R. KAUFMAN, *Chief Judge;* HONORABLE WILLIAM H. TIMBERS, *Circuit Judge;* HONORABLE HOWARD T. MARKEY, *U. S. Court of Customs and Patent Appeals, sitting by designation.*

UNITED STATES OF AMERICA,
Respondent,

v.

JOSEPH SALVATORE COLOGNINO,
Appellant.

79-1040

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit

1. Implicit in Judge Curtin's ruling on the motion for a directed verdict was a finding that Colognino's participation in a conspiracy with Jackson had been demonstrated by a preponderance of the evidence independent of the hearsay declarations. *See, e.g., United States* v. *Baker*, 419 F. 2d 83, 88-89 (2d Cir. 1969), *cert. denied*, 397 U.S. 971 (1970); *United States* v. *Stromberg*, 268 F. 2d 256, 266 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). The decision to admit the declaration "subject to connection" was proper. *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

2. The prosecutor represented, and Jury Curtin clearly believed, that dismissal of the charges against Brown could not have been made before jury selection. There was no evidence that the dismissal was timed with the intention of prejudicing Colognino's right to peremptory challenges.

IRVING R. KAUFMAN, *Chief Judge.*

WILLIAM H. TIMBERS, *Circuit Judge.*

HOWARD T. MARKEY, *Chief Judge,*
U. S. Court of Customs and
Patent Appeals.

APPENDIX B

Statutes Involved

21 U.S.C. §841 — Prohibited Acts A-Unlawful Acts

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

21 U.S.C. §846 — Attempt and Conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

18 U.S.C. §2 — Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

No. 78-1939

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH S. COLOGNINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1939

JOSEPH S. COLOGNINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that hearsay statements of a co-conspirator were improperly admitted into evidence subject to connection and that the government deliberately dismissed charges against a co-defendant after the jury had been selected so as to deprive petitioner of his right to exercise his peremptory challenges.

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of conspiracy to distribute a controlled substance (21 U.S.C. 846) and three counts of aiding and abetting the sale of controlled substances (21 U.S.C. 841(a)(1) and 18 U.S.C. 2). He was sentenced to five years' imprisonment, to be followed by a two-year special parole term. The court of appeals affirmed in a memorandum opinion (Pet. App. A1-A2).

The evidence at trial, which is not disputed here, showed that petitioner was a supplier of phencyclidine hydrochloride (PCP). DEA Agent Iwinski, acting in an undercover capacity, purchased PCP on three occasions between January and March 1978 from petitioner's co-defendant, Hiawatha Jackson.[1] Jackson testified in detail that petitioner provided the PCP for each sale, arranged the meeting place, and kept most of the proceeds from the sales. Although Agent Iwinski never met petitioner, surveillance teams saw petitioner drive Jackson to the rendezvous point for the first sale and then meet with him immediately after the sale was completed (Tr. 622-653). Petitioner was also close by during the second sale and again met Jackson after the deal was completed (Tr. 637-642). Finally, on the third sale, petitioner parked his car a short distance from Jackson and Agent Iwinski, and when agents moved in to arrest Jackson, petitioner fled the area and was apprehended after a high-speed chase (Tr. 699-704, 708-710, 753-758).

1. Petitioner contends (Pet. 9-14) that it was procedurally improper to admit hearsay testimony about co-conspirator Jackson's statements "subject to" later proof of a conspiracy between petitioner and Jackson. Significantly, however, petitioner does not argue that no conspiracy was proved. Indeed, he cannot, for Jackson

[1]Prior to trial, Jackson pleaded guilty to one count of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1). He then testified for the government at petitioner's trial and was subsequently sentenced to four years' probation.

The indictment against another co-defendant, Melvin Brown, was dismissed prior to trial. Jackson testified, and Brown confirmed that the latter only used his car to drive Jackson to the second and third sales with Iwinski but knew nothing about the transactions (Tr. 392-395, 402-403, 407-408, 414).

himself testified about his dealings with petitioner—that the latter provided the PCP for each of the sales and arranged the locations for the meetings with Agent Iwinski; that petitioner drove Jackson to the first rendezvous and immediately afterwards received the money from Jackson (Tr. 369-386); that petitioner drove to the second meeting site, gave the PCP to Jackson, and again waited for the money (Tr. 390-392, 397-402); and that petitioner met with Jackson immediately prior to the third sale to tell him where the PCP was located (Tr. 405-407, 410-412). Petitioner's claim thus reduces itself to a complaint about the order of proof at trial, a matter left to the wide discretion of the trial court.[2] *United States* v. *Lyles*, 593 F. 2d 182, 194 (2d Cir.), cert. denied, No. 78-1332 (March 26, 1979); *United States* v. *Ziegler*, 583 F. 2d 77, 80 (2d Cir. 1978); *United States* v. *Macklin*, 573 F. 2d 1046, 1049 n.3 (8th Cir.), cert. denied, No. 77-6895 (October 2, 1978). In any event, Agent Iwinski's testimony about Jackson's statements to him was clearly harmless, for Jackson testified about the same events, and petitioner's counsel availed himself of the opportunity to cross-examine this witness. See *Nelson* v. *O'Neil*, 402 U.S. 622 (1971).

2. Petitioner also claims (Pet. 15-19) that the dismissal of the indictment against co-defendant Brown after the jury was selected was deliberately done to deprive petitioner of the opportunity to select an impartial jury. This claim is without merit.

The jury for petitioner's trial was selected on October 10, 1978, but the trial date itself was postponed to

[2]Moreover, the trial court instructed the jury during Iwinski's testimony that Jackson's statements were not to be considered against petitioner until the jury determined beyond a reasonable doubt that a conspiracy existed between Jackson and petitioner (Tr. 118-119).

November 6th. In the intervening period, a new prosecutor took over the case and interviewed co-defendant Jackson, who had already pleaded guilty. These interviews occurred shortly before the trial was to take place; it was on these occasions that the prosecutor learned for the first time that Jackson would exonerate Brown (see C.A. App. 82; Tr. 306).[3] The government then moved to dismiss the indictment against Brown. This was done immediately before the beginning of petitioner's trial, and the trial court promptly instructed the jury that the dismissal as to Brown "is not to influence your judgment one way or the other about the evidence as far as [petitioner] is concerned" (Tr. 104-105). While it would have been preferable to have accomplished Brown's dismissal before jury selection took place, petitioner has made no showing that the dismissal was timed intentionally so as to interfere with his right to utilize his peremptory challenges, and both courts below found to the contrary (see Pet. App. A2). Petitioner recognizes that the prosecution is vested with discretion as to whether to prosecute and when to dismiss (see *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *United States* v. *Cowan*, 524 F. 2d 504 (5th Cir. 1975), cert. denied *sub nom. Woodruff* v. *United States*, 425 U.S. 971 (1976); *United States* v. *Cox*, 342 F. 2d 167 (5th Cir.) (en banc), cert. denied *sub nom. Cox* v. *Hauberg*, 381 U.S. 935 (1965)), and there is no indication that this discretion was in any way abused here.[4]

---

[3]"C.A. App." refers to the appendix filed by petitioner in the court of appeals.

[4]Nor can petitioner gain any support from *Rogers* v. *United States*, 304 F. 2d 520, 523 (5th Cir. 1962), on which he relies (Pet. 17). First, in *Rogers* "a motion for a mistrial was made and the basis for the court of appeals' decision was that the defendants should not have been joined in the first place." *United States* v. *McCambridge*, 551 F. 2d 865, 872 (1st Cir. 1977). Here, petitioner does not contend that he was entitled to a severance before the guilty plea. Second, here the district court instructed the jury not to draw any conclusions about petitioner from the dismissal of his co-defendant. In *Rogers* no such instruction appears to have been given. See *id.* at 872. Nor is this case like *United States* v. *Rispo*, 460 F. 2d 965, 973 (3d Cir. 1972), also relied on by petitioner (Pet. 18), for there is no indication that the indictment was brought against Brown in anything but good faith.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

DOJ-1979-08

78-1939

In The

Supreme Court of the United States

October Term, 1979

No. A-1053

JOSEPH S. COLOGNINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN W. CONDON, JR., ESQ.
Attorney for Petitioner
300 Statler Office Building
Buffalo, New York 14202
(716) 856-2183

Condon, Sedita & LaTona, P. C.
Of Counsel

July 1, 1979

Daily Record Corporation
Rochester, New York

(4956)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Chronology	*ii*
Preliminary Statement	*iii*
Table of Authorities	*iv*
Opinion Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statutes and Rules Involved	2
Questions Presented	4
Statement of Facts	5

REASONS FOR GRANTING THE WRIT

I. Does the regularly employed prosecutorial device of "subject to connection" pass constitutional muster when used to admit statements of a co-conspirator in violation of the hearsay rule?	9
II. In a multi-defendant case, may the Government create its own strategic advantage by the belated dismissal as to a co-defendant once trial proceedings have commenced?	15
Conclusion	19

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit	A-1
Appendix B — Statutes Involved	B-1

CHRONOLOGY

3/23/78	Arrest.
3/31/78	Indictment.
9/ 5/78	Plea of guilty by co-defendant, Hiawatha Jackson.
10/10/78	Jury selection by Petitioner and co-defendant, Melvin Brown.
	First interview of co-defendant Jackson by Government.
11/ 2/78	Second interview of co-defendant Jackson.
11/ 5/78	Third interview of co-defendant Jackson.
11/ 6/78	Dismissal as to co-defendant Brown on Government's motion.
	Commencement of Petitioner's trial.
11/16/78	Jury verdict of guilty as to Petitioner.
1/11/79	Petitioner sentenced.
5/17/79	Second Circuit Court of Appeals affirmance of conviction.

PRELIMINARY STATEMENT

Petitioner is a 35-year-old assembly line automation tender who presently resides in the Buffalo, New York suburb of Cheektowaga with his wife and two young daughters. Although originally indicted with two co-defendants on federal drug distribution charges in late March, 1978, he eventually stood trial alone the following November.

One co-defendant, HIAWATHA JACKSON, entered a plea of guilty in early September, 1978, and became a key prosecution witness at Mr. Colognino's trial. Melvin Brown, the second co-indictee, was dismissed from the action on the Government's initiative only moments before the swearing of the jury. Approximately two months after his conviction, Petitioner was sentenced to concurrent five year prison terms and a special two year parole term by the HONORABLE JOHN T. CURTIN of the Western District of New York.

By this petition, Mr. Colognino seeks to challenge the Government's continued reliance upon the doctrine of conditional admissibility as a means of prematurely introducing facially hearsay testimony in conspiracy-type prosecutions. Petitioner also endeavors to bring before the Court the impropriety of the untimely dismissal with respect to MELVIN BROWN on the very afternoon when trial was scheduled to commence.

TABLE OF AUTHORITIES

	Page
Berger v. United States, 295 U. S. 78 (1934)	16
Blumenthal v. United States, 332 U. S. 539 (1947)	12
Bordenkircher v. Hayes, 434 U. S. 357 (1978)	16
Bruton v. United States, 391 U. S. 123 (1968)	12
Carroll v. State, 139 Fla. 233, 190 So. 437 (1939)	17
Glasser v. United States, 315 U. S. 60 (1942)	11, 14
Holland v. United States, 348 U.S. 121 (1954)	16
Jackson v. Denno, 378 U. S. 368 (1964)	12
Krulewitch v. United States, 336 U.S. 440 (1949)	9, 11, 12
Mapp v. Ohio, 367 U. S. 643 (1961)	19
Nader v. Saxbe, 497 F. 2d 676 (D. C. Cir. 1974)	16
Rochin v. California, 342 U. S. 165 (1952)	19
Rogers v. United States, 304 F. 2d 520 (5th Cir. 1962)	17
Serfass v. United States, 410 U. S. 377 (1975)	16
State v. Thompson, 68 Ariz. 386, 206 P. 2d 1037 (1949)	18
Swain v. Alabama, 380 U. S. 202 (1965)	18
United States v. Dennis, 183 F. 2d 201 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951)	12
United States v. Geaney, 417 F. 2d 1116 (2d Cir. 1969) *cert. denied sub nom., Lynch v. United States*, 397 U. S. 1028 (1970)	10, 12, 13
United States v. James, 576 F. 2d 1121 (1978), *modified*, 590 F. 2d 575 (5th Cir. 1979)	19
United States v. Lusterino, 450 F. 2d 576 (2d Cir. 1971)	19

	Page
United States v. Macklin, 573 F. 2d 1046 (8th Cir.), *cert. denied*, ____ U. S. ____, 99 S. Ct. 160 (1978)	10, 11
United States v. Mutchler, 559 F. 2d 955 (1977), *modified*, 566 F. 2d 1044 (5th Cir. 1978)	18
United States v. Nixon, 418 U. S. 683 (1974)	10
United States v. Petroziello, 548 F. 2d 20 (1st Cir. 1977)	10, 11
United States v. Rispo, 460 F. 2d 965 (3d Cir. 1972)	18
United States v. Sams, 470 F. 2d 751 (5th Cir. 1972)	18
United States v. Turner, 558 F. 2d 353 (9th Cir. 1977)	18
William v. Florida, 399 U. S. 78 (1970)	16

United States Constitution

Fifth Amendment	2, 12

Statutes and Rules

ABA Code of Professional Responsibility, Canon 7, EC 7-13	4, 16
ABA Standards for Criminal Justice	
The Prosecution Function, §3.11 (1971)	4, 16
Crimes and Criminal Procedure	
18 U.S.C. §2 (1951)	2, 4
Drug Abuse Prevention and Control	
21 U.S.C. §841 (1970)	1, 4
21 U.S.C. §846 (1970)	1, 4
Federal Rules of Criminal Procedure [Title 18, U.S.C.]	
Rule 29	3, 13

Page

Federal Rules of Evidence [Title 28, U.S.C.]

Rule 104 ..... 2, 10, 11, 14

Rule 611 ..... 3, 14

Rule 801 ..... 3, 9, 10, 13

Rule 802 ..... 3, 9

Articles and Treatises

Maguire and Epstein, *Preliminary Questions of Fact in Determining The Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927) 14

1 J. Weinstein and M. Berger, *Weinstein's Evidence*, Rules 101-403 (Matthew Bender 1978) 11

In The

Supreme Court of the United States

October Term, 1979

No. A-1053

JOSEPH S. COLOGNINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, JOSEPH S. COLOGNINO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 17, 1979.

OPINION BELOW

The opinion of the Court of Appeals, dated May 17, 1979, is reprinted in Appendix A, *infra*, at p. A-1 *et seq.*

JURISDICTION

Following a jury trial in the United States District Court for the Western District of New York, Petitioner was found guilty on November 16, 1978, of three counts of accessorial conduct and one count of conspiracy as to the distribution of a controlled substance, phencyclidine hydrochloride. 21 U. S. C. §841(a) (1),

§846; 18 U. S. C. §2. On January 11, 1979, the HONORABLE JOHN T. CURTIN imposed a sentence consisting of concurrent five year prison terms and a special two year parole term on each count.

Petitioner perfected an appeal to the United States Court of Appeals for the Second Circuit. On May 17, 1979, his conviction was affirmed by a three-judge panel.

This petition for a Writ of Certiorari is filed within 45 days of that ruling; an extension of time having been granted by Mr. Justice Thurgood Marshall in an order dated June 5th, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, which provides in pertinent part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law ...."

STATUTES AND RULES INVOLVED

Fed. Rules Evid. [28 U. S. C.], which provide in pertinent part:

Rule 104. Preliminary Questions

> "(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> "(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

> "(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests."

Rule 611. Mode and Order of Interrogation and Presentation.

> "(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Rule 801. Definitions [Hearsay]

> "(d) Statements which are not hearsay. A statement is not hearsay if ....
>
> "(2) Admission by party opponent. The statement is offered against a party and is ... (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

Rule 802. Hearsay Rule

> "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Fed. Rules Cr. Proc. [18 U.S.C.], which provide in pertinent part:

Rule 29. Motion for Judgment of Acquittal

> "(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on

> motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . . "

ABA Code of Professional Responsibility, Canon 7, which provides in pertinent part:

> "EC 7-13. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. . . . Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."

ABA Standards for Criminal Justice, *The Prosecution Function*, which provide in pertinent part:

3.11 Disclosure of evidence by the prosecutor.

> "(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused."

Title 21, United States Code, Sections 841 and 846, as well as Title 18, United States Code, Section 2, because of their limited applicability to this petition, are reprinted in pertinent part in Appendix B, *infra*, at B-1 *et seq.*

QUESTIONS PRESENTED

1. Does the regularly employed prosecutorial device of "subject to connection" pass constitutional muster when used to admit statements of a co-conspirator in violation of the hearsay rule?

2. In a multi-defendant case, may the Government create its own strategic advantage by the belated dismissal as to a co-defendant once trial proceedings have commenced?

STATEMENT OF FACTS

On March 23, 1978, in the Buffalo, New York suburb of Cheektowaga, agents of the Drug Enforcement Administration arrested Petitioner, HIAWATHA JACKSON and MELVIN BROWN (9).* The affidavit sworn to on the following day by Agent-in-Charge, JOHN M. IWINSKI, averred that Mr. Jackson had sold varying quantities of phencyclidine hydrochloride to him on four different occasions during the first three months of 1978 (8-9). Contrasted with the absence of any direct evidence against Petitioner, other than his presence in the vicinity of these drug transfers, the Iwinski affidavit contained directly incriminatory information as to Mr. Brown (8-9).

On the date of the final transaction, Mr. Jackson reportedly declared in Mr. Brown's presence that Agent Iwinski should surrender the money for the drugs to Brown (9). As the parties later departed to consummate the delivery, Agent Iwinski recalled Mr. Jackson proclaiming that Melvin Brown ". . . would follow to make sure that nothing went wrong" (65). Questioned on cross-examination as to whether Mr. Brown was innocent, Agent Iwinski forthrightly responded: "I don't believe so" (Tr. 225-226).**

Despite the postponement of jury selection on September 5, 1978, Hiawatha Jackson appeared before the HONORABLE JOHN T. CURTIN and entered a plea of guilty to the third count of the indictment (98). However, his first meeting with Agent Iwinski, apparently in anticipation of his appearance as a witness at trial, did not occur until exactly five weeks later on October 10, 1978 (55). At precisely the same time, Petitioner and Mr. Brown were jointly enaged in jury selection in anticipation

---

*( ) refers to pages of Appendix filed in the United States Court of Appeals for the Second Circuit.

**(Tr.) refers to pages of trial transcript not incorporated into Appendix.

of their imminent trial (4). The communal character of this proceeding is reflected in their sharing of peremptory challenges; each round being prefaced by meetings among the two remaining defendants and their attorneys in the outer corridor of the courtroom (24-37).

The Government's initial interview of Mr. Jackson was later supplemented by two additional pretrial conferences on the 2d and 5th days of November, 1978 (55-57). Melvin Brown's complicity in the events underlying the indictment was not even raised until the last-mentioned date in a span of "[m]aybe a few minutes" (94-95). When Jackson responded that he could not recall ever instructing Agent Iwinski to give the money to Brown, the matter was not pursued any further (93-95). As well, a written statement which was signed by Mr. Jackson in the context of the October 10th meeting with Agent Iwinski inexplicably referred to Melvin Brown on but three occasions as "a friend" (58, 113-114).

Armed by hindsight with knowledge of the above, the United States Attorney's motion to dismiss as to Mr. Brown on the afternoon of November 6, 1978, literally moments before the swearing in of the jury, lacks any element of surprise (39-41). However, from Petitioner's unenlightened perspective, including Mr. Brown's uncommunicated awareness during jury selection one month earlier that Mr. Jackson intended to exonerate him (88), this dramatic event could not have been more unexpected.

Relying upon this untimely dismissal, Petitioner unsuccessfully argued on the fc'lowing afternoon that his mutual exercise of peremptories with Mr. Brown provided a basis for a mistrial (80-84). In opposing this request, the United States Attorney memorialized the quandary which required Brown's removal from the proceedings:

> "It is not the case that the case against Brown was deemed to be worthy of dismissal following his [Jackson's] statement and it was only after I talked to Mr. Jackson myself last Thursday night for several hours that we decided that perhaps *based on his version* at that time and the explanation we had available to us then which was really the first time we had it, that the case against Mr. Brown would be better served by being dismissed and then I confirmed that again when I talked to Mr. Jackson Sunday." (82; emphasis supplied).

The first witness called by the Government was Agent Iwinski. At an early stage of his direct examination, he was queried as to a conversation he had engaged in with HIAWATHA JACKSON during the indictment period (42). Due to the presence of a conspiracy charge in the indictment (10-12) and counsel's awareness that Jackson had conversed with Agent Iwinski within this time frame (8-9), a meeting with the Court had been arranged prior to trial in an effort to establish the procedure which would be followed in applying the rule which permits admission of statements of a co-conspirator against a non-declarant party. A letter was then submitted to the Court reflecting counsel's best understanding that such facially hearsay testimony would only be deemed admissible *after* sufficient independent evidence had been presented to establish the existence of a conspiracy (38).

Despite counsel's objection that the Government clearly had not satisfied its requisite burden at the time of Agent Iwinski's appearance as a witness, the Court nevertheless permitted the prosecutor to proceed upon his representation that the hearsay response would later be connected to a conspiracy (42-49). The jury then returned to the courtroom and received an instruction that they would ultimately decide whether or not a conspiracy had been adequately proven antecedent to their consideration of the conditionally admitted hearsay testimony (50-51).

Aware that the Court's pretrial representation in this connection had been misunderstood, counsel attempted to clarify the basis for the hearsay objection the following morning. Referring to the earlier correspondence submitted on

Petitioner's behalf, Judge Curtin responded with certitude that he knew the nature of the objection (52-53).

At the close of testimony on November 14, 1978, the Court was requested to direct a verdict of acquittal or, alternatively, rule that the Government had failed to lay an appropriate foundation for admission of any facially hearsay testimony (Tr. 884-887). Judge Curtin's sole response in denying this motion encompassed a characterization of witness credibility as a jury question (Tr. 888-889).

Following the return of a guilty verdict on November 16, 1978, sentence was imposed on January 11, 1979. Petitioner's conviction was affirmed by the Court of Appeals for the Second Circuit in an opinion issued on May 17, 1979 (App. A, *infra*). An implicit finding by the trial court as to the existence of a conspiracy was found in Judge John T. Curtin's denial of the motion for a directed verdict of acquittal. Conditional admission of the hearsay testimony of Agent Iwinski was deemed proper. Viewing the last minute dismissal of Melvin Brown as unavoidable, the Second Circuit further ruled that Petitioner was not thereby prejudiced.

REASONS FOR GRANTING THE WRIT

I.

Does the regularly employed prosecutorial device of "subject to connection" pass constitutional muster when used to admit statements of a co-conspirator in violation of the hearsay rule?

Concurring in *Krulewitch v. United States*, 366 U.S. 440 (1949), Justice Jackson recognized the perplexing problems inherent in the rule which permits otherwise hearsay declarations to be introduced in conspiracy-type prosecutions:

> "When the trial starts, the accused feels the full impact of conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf., Blumenthal v. United States*, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 167 F. 2d 54." 336 U.S. at 453.

Starting with the proposition that hearsay is inadmissible, the Federal Rules of Evidence proceed to outline those extrajudicial statements which are not to be so characterized. Rules 802; 801. Included in the latter category are statements of a co-conspirator, provided the following elements are sufficiently established:

1. A conspiracy existed;
2. the defendant and the declarant were members;
3. the contested statements were uttered during the course; and
4. in furtherance of that concerted activity. Rule 801 (d) (2) (E).

Preliminary questions antecedent to the introduction of proferred evidence are governed by Rule 104. Whereas issues of competence are to be decided by the court pursuant to subdivision (a), matters of relevance are assigned to the jury in accordance with subdivision (b). A majority of the federal circuits now agree that the admissibility of statements of a co-conspirator properly falls within the court's domain under Rule 104(a). *See, e.g., United States v. Macklin,* 573 F. 2d 1046 (8th Cir.), *cert. denied,* ____U.S.____, 99 S. Ct. 160 (1978); *United States v. Petroziello,* 548 F. 2d 20 (1st Cir., 1977); *accord, United States v. Nixon,* 418 U.S. 683, 701 n.14 (1974); *United States v. Geaney,* 417 F. 2d 1116 (2d Cir. 1969), *cert. denied sub nom., Lynch v. United States,* 397 U.S. 1028 (1970).

Consistent with the judiciary's acceptance of its role in this context, the seldom questioned and much abused practice of permitting co-conspiratorial hearsay to be conditionally admitted subject to eventual connection must be evaluated. Usurpation of the function formerly served by the jury when this issue was injected into a trial has the effect of nullifying the primary justification for reliance upon the subject to connection approach as to questions of competence.

Continued recognition of the propriety of employing rules of conditional admissibility as to matters of relevancy (Rule 104(b)) flows from the substantially reduced risk of prejudice if irrelevant evidence is improperly presented to the jury:

> "The rationale behind giving such questions to the jury is that since no protective evidentiary policy is at stake the jury is just as capable as the judge in making a determination. The only real discriminations which must be made in this process involve evaluations of probative force which are within the usual domain of the jury. Consequently, following the judge's instructions to disregard the primary evidence if they find against the preliminary fact does not require the intellectual control required when trying to ignore matters which should be excluded under challenges to competence of the evidence." Weinstein and Berger, *1 Weinstein's Evidence,* Rules 101-403, at 104-54 (Matthew Bender 1978).

In conjunction with its adoption of Rule 104(a) as the appropriate guideline in handling questions pertaining to the admissibility of statements of a co-conspirator, the Fifth Circuit announced that the subject to connection procedure should be abandoned whenever practicable. *United States v. James,* 576 F. 2d 1121 (1978), *modified,* 590 F. 2d 575 (5th Cir. 1979). *Cf. United States v. Macklin, supra,* 573 F. 2d 1046, 1049, n.3; *United States v. Petroziello, supra,* 548 F. 2d 20, 23, n.3. The Fifth Circuit voiced concern with the following dangers which attach to conditionally admitting outwardly hearsay utterances:

1. Unconsciously bootstrapping the hearsay to the independent evidence to satisfy the four-fold elements referred to above.

2. Failing to undo the taint inflicted on the jurors' minds by the hearsay in the event the trial judge determines that the Government has not satisfied its antecedent burden.

3. Declaring a mistrial if a limiting instruction to disregard the hearsay has the appearance of futility.

The need to find the defendant's connection to the conspiracy from the independent evidence was pronounced by this Court in *Glasser v. United States,* 315 U.S. 60, 74-75 (1942). Since that ruling, courts have wrestled with the practical difficulty which confronts even the most able judicial mind attempting to comply with the bootstrapping prohibition. *E.g. Krulewitch v. United*

States, supra; United States v. Geaney, supra, 417 F. 2d 1116, 1120; *United States v. Dennis,* 183 F. 2d 201, 231 (2d Cir. 1950), *aff'd.* 341 U.S. 494 (1951).

Particularly to the degree that the preliminary and ultimate questions overlap (*i.e.,* the defendant's role as a conspirator), the risk of a due process violation is awesome. U.S. Constitution, Amendment V. An analogous danger faced this Court in considering the former New York procedure for determining the voluntariness of confessions. Stressing the overriding need for a reliable and decipherable determination of voluntariness separate and apart from the issue of truthfulness, a factfinding hearing in the jury's absence was recognized as the sole viable safeguard. *Jackson v. Denno,* 378 U.S. 368 (1964). The Court aptly framed the problem in the following terms:

> "The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession." 378 U.S. at 381.

In instances where the court finds that the prosecutor has not connected the hearsay declarations to a conspiracy, the impotency of a cautionary instruction to the jury is well documented. *E.g. Krulewitch v. United States, supra.* Such an instruction may tend to underscore rather than annihilate the importance of the inadmissible hearsay in the mind of the lay juror. In multiple defendant proceedings, this Court has seriously questioned the viability of a limiting instruction to consider highly prejudicial evidence against less than all of the parties. *Bruton v. United States,* 391 U.S. 123, 128-129 (1968); *Blumenthal v. United States,* 332 U.S. 539, 559 (1947).

The Second Circuit's rationale in affirming Petitioner's conviction discloses an additional risk in the conditional admission of outwardly hearsay testimony. Unable to locate a precise finding by the trial court that the Petitioner had been connected to a conspiracy, it was held that this ruling was implicit in Judge Curtin's denial of counsel's motion for a directed verdict of acquittal.

However, this holding neglects to consider the differing procedural rules applicable to determination of an acquittal motion. In accordance with Rule 29 (a) of the Federal Rules of Criminal Procedure, the court must examine the evidence in a light most favorable to the Government. The trial judge is required to decide whether the evidence presented, if believed, would be sufficient to sustain a conviction. As well, the burden of persuasion is placed squarely on the accused, rather than the prosecutor.

In marked contrast, Second Circuit procedure mandates application of a preponderance of the evidence standard to the question of whether or not proffered hearsay has been sufficiently connected to a conspiracy. *United States v. Geaney, supra.* To the degree that this criteria contemplates a weighing of the evidence, including an assessment of witness credibility, it would be at variance with the standard applied to a motion for acquittal. Significantly, Judge Curtin's sole response in denying counsel's motion at the close of the Government's case was framed in terms of witness credibility being a jury question (Tr. 888-889). As to the burden of persuasion on an issue of evidentiary admissibility, it is also beyond cavil that the onus rests with the proponent; in this case the Government, not the accused.

From another perspective, Fed. Rules Evid. 801(d) (2) (E) clearly contemplates a finding not only as to a defendant's membership in a conspiracy, but also that the proferred hearsay was uttered during the course and in furtherance of the con-

certed enterprise. That similar factors are not necessarily encompassed in the evaluation of a motion for a directed verdict of acquittal cannot be gainsaid.

The Second Circuit's ruling also neglects to consider the bootstrapping prohibition as to a defendant's connection with a conspiracy. *Glasser v. United States, supra.* In a word, appellate review is rendered meaningless; it being "next to impossible to unscramble the egg." Maguire and Epstein, *Preliminary Questions of Fact In Determining the Admissibility of Evidence,* 40 Harv. L. Rev. 392, 394-395 (1927).

The solution is clearly workable and consistent with the Federal Rules of Evidence. Subdivision (c) of Rule 104 makes specific provision for a hearing in the jury's absence as a mechanism for resolving preliminary questions of competency. Equally, the trial court is empowered under Rule 611(a) to control the order of proof.

The recent recognition by a majority of the federal circuits of the trial judge's responsibility to resolve the preliminary issue as to admission of statements of a co-conspirator provides an appropriate opportunity for announcement of a procedural rule more protective of a defendant's right to a fair trial. The risks of prejudice which are interwoven in the subject to connection approach are in no fashion counterbalanced by the minimal inconvenience attendant to the procedure advocated herein.

II

In a multi-defendant case, may the Government create its own strategic advantage by the belated dismissal as to a co-defendant once trial proceedings have commenced?

The extended factual recitation at the outset of this petition is designed to document the basis for counsel's assertion that the Government consciously refrained from exploring the degree of Melvin Brown's complicity in the events giving rise to Petitioner's conviction. The motivation for this omission is reflected in the United States Attorney's statement that Hiawatha Jackson's *version* of those events necessitated a dismissal as to Mr. Brown. In other words, had Brown remained as a co-defendant and been exonerated by his longtime friend, the Government would have effectively impeached its own key witness. This conduct becomes particularly troublesome in light of the supervising agent's (Iwinski's) concession that he did not believe Mr. Brown was innocent.

The Government's allegations as to Mr. Jackson related solely to his sale of drugs to Agent Iwinski. As a consequence, the dismissal with respect to Brown served the ancillary purpose of avoiding any implication that he was indeed Jackson's source of supply. Conversely, Brown's initial insertion as a co-defendant followed by his later removal *after* jury selection served to reinforce the inference that Mr. Brown had not performed this function. The trial therefore became, prior to the appearance of the first witness, a self-fulfilling prophecy that, circumstantially, Petitioner had to be the culprit.

Although available for the preceding five weeks, Mr. Jackson was never interviewed by any Government representative until the very day that Petitioner and Mr. Brown selected a jury. Brown was not even discussed on that date and was referred to in Jackson's written statement simply as "a friend." During two ensuing conferences with Jackson, Brown's involvement was

covered over a period of minutes. Hiawatha Jackson's blanket denial of those matters which bore heavily against Brown's innocence was taken at face value. *Cf.* ABA Standards for Criminal Justice, *The Prosecution Function*, §3.11(c) [1971].

In moving to dismiss as to Melvin Brown, the United States Attorney waited until the last available opportunity before jeopardy would conceivably have attached: immediately prior to the swearing in of the trial jury. *Serfass v. United States*, 420 U.S. 377 (1975). To allow this strategic ploy to remain intact without judicial intervention would violate Justice White's characterization of the adversary system as:

> "... hardly an end in itself; it is not yet a poker game in which player's enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82 (1970; footnote omitted).

Although the prosecutor is provided with substantial latitude as to the charging decision, this Court has recognized that his discretion is not beyond reproach.

> "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 669 (1978; footnote omitted.)
>
> *Accord, Nader v. Saxbe*, 497 F. 2d 676, 679-680 n.19 (D.C. Cir. 1974).

Persistent citation having served to undercut its intended meaning, the concept is nevertheless viable that a prosecutor's duty is to see that justice is done rather than convictions secured. *Holland v. United States*, 348 U.S. 121, 135-136 (1954); *Berger v. United States*, 295 U.S. 78, 88 (1934); ABA Code of Professional Responsibility, Canon 7, EC 7-13. Significantly, the *Holland* Court perceived this obligation, in the analogous

context of tax evasion prosecutions, as contemplating the good faith pursuit of any leads which could reasonably tend to negate the target taxpayer's guilt.

The consequent harm suffered by Petitioner herein requires an examination of the selection of the jury four weeks in advance of the actual presentation of evidence. The record is replete with instances which depict the communal nature of this proceeding as between Petitioner and Mr. Brown. Each round of peremptory challenges was preceded by a meeting of the parties and their attorneys outside the courtroom. All challenges thereafter exercised were appropriately announced as flowing from a mutual consensus among the participants.

Unbeknownst to Petitioner, this appearance of cooperation was not absolute. Through his later appearance as a Government witness, Mr. Brown confessed that he had been cognizant of Mr. Jackson's intention to exonerate him for a number of months. In effect, this revelation meant that Brown and his attorney had approached *voir dire* with an interest coincident to that of the Government: selection of a panel which would be inclined to view Hiawatha Jackson as a credible witness. From a varied perspective, Petitioner also suffered to the degree that his evaluation of the venire was framed against a factual backdrop which would no longer be viable at the time the jury was to be sworn.

Although recognized to be of limited precedential value, the Supreme Court of Florida found cause for reversal where, in the midst of jury selection, a severance had been granted to a co-defendant with whom the appellant had been required to share peremptory challenges. *Carroll v. State*, 139 Fla. 233, 190 S. 437 (1939). Equally, the Fifth Circuit has condemned, as unduly prejudicial, the practice of permitting a co-defendant to enter a plea of guilty after selection of the jury. *Rogers v. United States*, 304 F. 2d 520 (5th Cir. 1962).

From another vantage point, any impairment of so valued a right as the peremptory challenge embodies reversible error even absent a showing of prejudice. *Swain v. Alabama*, 380 U.S. 202, 219 (1965). Whether or not the jury, as empanelled, constituted a fair and impartial factfinder is not the determinative factor. *E.g. State v. Thompson*. 68 Ariz. 386, 206 P. 2d 1037 (1949). In this connection, Petitioner respectfully takes issue with that portion of the Second Circuit's affirmance which is couched in terms of an absence of any showing of prejudice. App. A., *infra*.

"Impairment" of the peremptory challenge has been found in instances where a jury is chosen in reliance upon information rendered obsolete prior to the actual presentation of evidence; as where members of the panel are permitted to sit on other similar prosecutions during the interim. *United States v. Mutchler*, 559 F. 2d 955 (1977), *modified*, 566 F. 2d 1044 (5th Cir. 1978). The overwhelming importance of defense counsel's perception of the scenario in which peremptories are exercised is reflected in *United States v. Turner*, 558 F. 2d 535 (9th Cir. 1977), and *United States v. Sams*, 470 F. 2d 751 (5th Cir. 1972). Reversal in each case flowed from confusion surrounding the trial court's procedure for finding a waiver of unexpended peremptories.

From the standpoint of the prosecutor's role in permitting jury selection to occur against a misapprehended factual backdrop, Melvin Brown's participation in *voir dire* differs little in ultimate effect from instances where a "sham" defendant has been deceptively inserted into the trial framework. Rejecting application of the harmless error yardstick in this context, the Third Circuit has observed that: "... the effect of some errors which affect the entire trial process cannot be intelligently gauged by applying such a test." *United States v. Rispo*, 460 F. 2d 965, 974 (3d Cir. 1972). In similar fashion, the Second Circuit has warned that:

> "When the prosecution participates in allowing a false picture to be painted, it bears a heavy burden of showing that it could not have affected the verdict." *United States v. Lusterino*, 450 F. 2d 572, 575 (2d Cir 1971).

This Court's analysis of other due process violations evidences a concern for the fairness of the procedure rather than the correctness of the outcome. For example, in *Mapp v. Ohio*, 367 U.S. 643 (1961), an element of due process was found in the formulation of an exclusionary rule prohibiting illegal searches and seizures. Employment of forcible stomach-pumping in an effort to retrieve swallowed morphine capusules has also been held to implicate due process considerations without regard to whether or not an illegal substance was ultimately recovered. *Rochin v. California*, 342 U.S. 165 (1952).

Review is therefore sought by the entire Court as to the scope of the prosecutor's duty in the context of a trial defendant's right to the unfettered exercise of peremptory challenges at jury selection.

CONCLUSION

For all these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

JOHN W. CONDON, JR., ESQ.
Attorney for Petitioner
300 Statler Office Building
Buffalo, New York 14202
(716) 856-2183

Condon, Sedita & LaTona, P. C.
Of Counsel

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of May one thousand nine hundred and seventy-nine.

PRESENT: HONORABLE IRVING R. KAUFMAN, *Chief Judge;* HONORABLE WILLIAM H. TIMBERS, *Circuit Judge;* HONORABLE HOWARD T. MARKEY, *U. S. Court of Customs and Patent Appeals, sitting by designation.*

UNITED STATES OF AMERICA,
Respondent,

v.

JOSEPH SALVATORE COLOGNINO,
Appellant.

79-1040

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit

1. Implicit in Judge Curtin's ruling on the motion for a directed verdict was a finding that Colognino's participation in a conspiracy with Jackson had been demonstrated by a preponderance of the evidence independent of the hearsay declarations. *See, e.g., United States* v. *Baker*, 419 F. 2d 83, 88-89 (2d Cir. 1969), *cert. denied*, 397 U.S. 971 (1970); *United States* v. *Stromberg*, 268 F. 2d 256, 266 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). The decision to admit the declaration "subject to connection" was proper. *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

2. The prosecutor represented, and Jury Curtin clearly believed, that dismissal of the charges against Brown could not have been made before jury selection. There was no evidence that the dismissal was timed with the intention of prejudicing Colognino's right to peremptory challenges.

IRVING R. KAUFMAN, *Chief Judge.*

WILLIAM H. TIMBERS, *Circuit Judge.*

HOWARD T. MARKEY, *Chief Judge,*
U. S. Court of Customs and
Patent Appeals.

APPENDIX B

Statutes Involved

21 U.S.C. §841 — Prohibited Acts A-Unlawful Acts

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

21 U.S.C. §846 — Attempt and Conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

18 U.S.C. §2 — Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

No. 78-1939

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH S. COLOGNINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1939

JOSEPH S. COLOGNINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that hearsay statements of a co-conspirator were improperly admitted into evidence subject to connection and that the government deliberately dismissed charges against a co-defendant after the jury had been selected so as to deprive petitioner of his right to exercise his peremptory challenges.

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of conspiracy to distribute a controlled substance (21 U.S.C. 846) and three counts of aiding and abetting the sale of controlled substances (21 U.S.C. 841(a)(1) and 18 U.S.C. 2). He was sentenced to five years' imprisonment, to be followed by a two-year special parole term. The court of appeals affirmed in a memorandum opinion (Pet. App. A1-A2).

The evidence at trial, which is not disputed here, showed that petitioner was a supplier of phencyclidine hydrochloride (PCP). DEA Agent Iwinski, acting in an undercover capacity, purchased PCP on three occasions between January and March 1978 from petitioner's co-defendant, Hiawatha Jackson.[1] Jackson testified in detail that petitioner provided the PCP for each sale, arranged the meeting place, and kept most of the proceeds from the sales. Although Agent Iwinski never met petitioner, surveillance teams saw petitioner drive Jackson to the rendezvous point for the first sale and then meet with him immediately after the sale was completed (Tr. 622-653). Petitioner was also close by during the second sale and again met Jackson after the deal was completed (Tr. 637-642). Finally, on the third sale, petitioner parked his car a short distance from Jackson and Agent Iwinski, and when agents moved in to arrest Jackson, petitioner fled the area and was apprehended after a high-speed chase (Tr. 699-704, 708-710, 753-758).

1. Petitioner contends (Pet. 9-14) that it was procedurally improper to admit hearsay testimony about co-conspirator Jackson's statements "subject to" later proof of a conspiracy between petitioner and Jackson. Significantly, however, petitioner does not argue that no conspiracy was proved. Indeed, he cannot, for Jackson

[1]Prior to trial, Jackson pleaded guilty to one count of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1). He then testified for the government at petitioner's trial and was subsequently sentenced to four years' probation.

The indictment against another co-defendant, Melvin Brown, was dismissed prior to trial. Jackson testified, and Brown confirmed that the latter only used his car to drive Jackson to the second and third sales with Iwinski but knew nothing about the transactions (Tr. 392-395, 402-403, 407-408, 414).

himself testified about his dealings with petitioner—that the latter provided the PCP for each of the sales and arranged the locations for the meetings with Agent Iwinski; that petitioner drove Jackson to the first rendezvous and immediately afterwards received the money from Jackson (Tr. 369-386); that petitioner drove to the second meeting site, gave the PCP to Jackson, and again waited for the money (Tr. 390-392, 397-402); and that petitioner met with Jackson immediately prior to the third sale to tell him where the PCP was located (Tr. 405-407, 410-412). Petitioner's claim thus reduces itself to a complaint about the order of proof at trial, a matter left to the wide discretion of the trial court.[2] *United States* v. *Lyles*, 593 F. 2d 182, 194 (2d Cir.), cert. denied, No. 78-1332 (March 26, 1979); *United States* v. *Ziegler*, 583 F. 2d 77, 80 (2d Cir. 1978); *United States* v. *Macklin*, 573 F. 2d 1046, 1049 n.3 (8th Cir.), cert. denied, No. 77-6895 (October 2, 1978). In any event, Agent Iwinski's testimony about Jackson's statements to him was clearly harmless, for Jackson testified about the same events, and petitioner's counsel availed himself of the opportunity to cross-examine this witness. See *Nelson* v. *O'Neil*, 402 U.S. 622 (1971).

2. Petitioner also claims (Pet. 15-19) that the dismissal of the indictment against co-defendant Brown after the jury was selected was deliberately done to deprive petitioner of the opportunity to select an impartial jury. This claim is without merit.

The jury for petitioner's trial was selected on October 10, 1978, but the trial date itself was postponed to

[2]Moreover, the trial court instructed the jury during Iwinski's testimony that Jackson's statements were not to be considered against petitioner until the jury determined beyond a reasonable doubt that a conspiracy existed between Jackson and petitioner (Tr. 118-119).

November 6th. In the intervening period, a new prosecutor took over the case and interviewed co-defendant Jackson, who had already pleaded guilty. These interviews occurred shortly before the trial was to take place; it was on these occasions that the prosecutor learned for the first time that Jackson would exonerate Brown (see C.A. App. 82; Tr. 306).[3] The government then moved to dismiss the indictment against Brown. This was done immediately before the beginning of petitioner's trial, and the trial court promptly instructed the jury that the dismissal as to Brown "is not to influence your judgment one way or the other about the evidence as far as [petitioner] is concerned" (Tr. 104-105). While it would have been preferable to have accomplished Brown's dismissal before jury selection took place, petitioner has made no showing that the dismissal was timed intentionally so as to interfere with his right to utilize his peremptory challenges, and both courts below found to the contrary (see Pet. App. A2). Petitioner recognizes that the prosecution is vested with discretion as to whether to prosecute and when to dismiss (see *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *United States* v. *Cowan*, 524 F. 2d 504 (5th Cir. 1975), cert. denied *sub nom. Woodruff* v. *United States*, 425 U.S. 971 (1976); *United States* v. *Cox*, 342 F. 2d 167 (5th Cir.) (en banc), cert. denied *sub nom. Cox* v. *Hauberg*, 381 U.S. 935 (1965)), and there is no indication that this discretion was in any way abused here.[4]

---

[3]"C.A. App." refers to the appendix filed by petitioner in the court of appeals.

[4]Nor can petitioner gain any support from *Rogers* v. *United States*, 304 F. 2d 520, 523 (5th Cir. 1962), on which he relies (Pet. 17). First, in *Rogers* "a motion for a mistrial was made and the basis for the court of appeals' decision was that the defendants should not have been joined in the first place." *United States* v. *McCambridge*, 551 F. 2d 865, 872 (1st Cir. 1977). Here, petitioner does not contend that he was entitled to a severance before the guilty plea. Second, here the district court instructed the jury not to draw any conclusions about petitioner from the dismissal of his co-defendant. In *Rogers* no such instruction appears to have been given. See *id.* at 872. Nor is this case like *United States* v. *Rispo*, 460 F. 2d 965, 973 (3d Cir. 1972), also relied on by petitioner (Pet. 18), for there is no indication that the indictment was brought against Brown in anything but good faith.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

DOJ-1979-08